

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BERNICE HOLLOWAY

Claimant

V.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

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Docket No. 1,077,384

ORDER

Claimant requests review of the September 13, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Randall W. Schroer, of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from September 12, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUE

The ALJ denied claimant's request for medical treatment after finding claimant did not provide timely notice of her injury.

Claimant appeals, arguing the ALJ erred in denying medical treatment due to a misrepresentation of the notice requirement. Claimant contends she gave proper notice to respondent the day after she knew her injury was work-related and respondent had actual knowledge of the injury, therefore the ALJ's Order should be reversed.

The issue on appeal is whether claimant gave proper notice of her alleged work-related accident, or, in the alternative, did respondent have actual knowledge of the alleged injury.

FINDINGS OF FACT

Claimant began working for respondent in 2008. Claimant's job for respondent involves bagging meat which requires that she stand all day. Claimant testified the machine she operates is too low for her and she has to bend over all day to do her work. Claimant testified she began to notice pain in her back in 2013 or 2014, and over time it progressed. The plant processes 3,000 cows a day, therefore meat is steadily and constantly coming down the conveyor to be bagged and sealed. Claimant's job is to pick out the lean meat from the conveyor belt.

Claimant indicated when she first noticed the pain in her back, she waited two to three weeks before asking to see a doctor. Claimant indicated that one of her friends told her she should try marijuana for her pain. She did, but it provided her no benefit. When claimant first reported her back pain she was immediately given a drug test and, when claimant tested positive for marijuana, her request for benefits was denied.

After her request for treatment was denied, claimant continued to work for respondent, taking Tylenol for the pain. Claimant testified her back pain got so bad she went to the doctor on her own. Claimant testified that in 2014 the pain was in her back, but by 2015 the pain was radiating into her leg. Claimant did not receive medical treatment until August 2015, at which time she had so much pain in her leg she could hardly stand. Claimant went to the doctor and was told the pain in her leg came from the middle part of her back, radiating down into her leg.

On her own, claimant met with David Fardon, M.D., on August 25, 2015, in Chicago¹, with back and leg pain. Claimant reported the pain being present since May 2015, at which time she thought she had a blood clot. Claimant was not able to work because of her inability to tolerate standing, taking a leave of absence and missing almost a month of work. When claimant left work, she was unaware of the cause of her problems. She informed respondent that she needed to go to her doctor to determine what was "going on with me".²

Dr. Fardon examined claimant and found she did not have a blood clot, diagnosing lumbar spinal stenosis. Dr. Fardon recommended an MRI to more precisely determine claimant's level and degree of stenosis and to advise the most effective treatment.

Claimant had an MRI of her lumbar spine on August 27, 2015, which revealed:

¹ Claimant is originally from Chicago, so she had access to a physician there.

² P.H. Trans. at 13.

Multilevel degenerative disc disease and facet arthropathy throughout the lumbar and visualized lower thoracic spine . . . Minimal degenerative malalignment at multiple levels. Most severe seen at L3-4 and L4-5. Congenital lumbar spinal canal narrowing, accentuated by degenerative findings. Resultant mild narrowing of the spinal canal at T12-L1 as well as L2-3 through L4-5. No significant spinal canal stenosis otherwise.

Severe right foraminal narrowing at L3-4 protruding disc likely compromising the exiting right L3 nerve root. Moderate to severe left foraminal narrowing at L4-5 by protruding disc with potential compromise of the left L4 exiting nerve root. Moderate left foraminal narrowing at L2-3 by disc material.³

After reviewing the MRI, Dr. Fardon recommended claimant have an epidural steroid injection from the right side at L3-4 transforaminally. On August 31, 2015, claimant received an epidural steroid injection under the care of April Fetzer, D.O.

On September 14, 2015, claimant met with Dr. Fetzer for followup from the epidural steroid injection. Claimant experienced two days of relief from the injection and then the pain returned. Another injection was recommended. Dr. Fetzer noted claimant's pain did not match the MRI pathology. Claimant was started on gabapentin and counseled on obtaining a Kansas physician for treatment. Claimant was taken off work until September 21, 2015. On September 16, 2015, claimant received a second epidural steroid injection by Dr. Fetzer.

On October 22, 2015, claimant returned to Dr. Fardon. She continued to have some pain in her lower back, but the pain in her leg was gone. Claimant was released to return to work with no restrictions.

When claimant went to Chicago, she took a leave of absence from her job with respondent from August 2015 to October 22, 2015. When claimant left on her leave of absence she was not sure what was wrong, but indicated she did report to respondent she was having back problems.

Q. Before you left did you tell somebody at Tyson, I'm having back problems from work I need to leave and take a leave of absence?

A. When I left Tyson I didn't know what was wrong with me. I know my leg and stuff was hurting and my back was hurting and I told them -- and I told them I needed to go to my doctor and see what's going on with me . . . I think it was in August . . . August 22nd . . . When I came back to work I went straight in the nursing office and told them what was going on . . .

THE COURT: And that was August 22, 2015?

³ *Id.*, Cl. Ex. 4 at 5; Resp. Ex. 1 at 3.

THE WITNESS: 2015.

THE COURT: Okay.

THE WITNESS: I told the nurse.

Q. (BY MR. FINCHER) When do you think you went back and told the nurse relative to when you saw the doctor?

A. Say that again.

Q. Okay. When did you go in and tell this nurse that you were -- what the doctor had said?

A. When I came back off of my -- my LOA.

Q. What -- what date was that?

A. I think that was the -- the 22nd is when I got all the doctors reports. I'm not sure what date that was but it was in August.

Q. Okay.

A. And I reported it to the nurse and told her that the doctor asked me if we had workmen comp on the job and he told him, Yeah, he told me I needed to go back to my doctor -- go to the doctor at my job.⁴

When claimant returned from her leave of absence, after seeking medical treatment in Chicago, she formally told respondent she wanted to make a workers compensation claim for her back. On cross-examination, claimant identified this date more accurately as October 22, 2015.⁵ After claimant had been back from Chicago for a while, respondent sent her to Dr. Foxx who told claimant she had a bulging or herniated disk in her back and that was why her leg was hurting.

Claimant continued to work for respondent after she reported her work injury and her condition continued to worsen. Claimant testified she continued to report her worsening condition. Claimant completed an illness information form on November 25, 2015, listing a date of injury as August 11, 2015. Claimant did not list a leg injury on this form because, while her back pain was worse, her leg pain was not. Claimant denies any accidents outside of work.

⁴ *Id.* at 13-14. August 22, 2015, is three days before claimant was examined by Dr. Fardon.

⁵ *Id.* at 32 and 41.

Claimant testified that when she returned from Chicago and reported her back and leg pain to respondent, she was not allowed to immediately file a report. She testified respondent waited quite a while before they called in her to the office to file a report.⁶ She testified that she knew an injury form was supposed to be filled out on the day of the injury.

Q. Okay. So let me ask a question: So you went to the plant medical and you gave them your off work slip and you said, I'm ready to come back to work because I have a return to work slip?

A. Right.

Q. And it was because -- you said it was because my back and my leg were hurting; is that right?

A. Uh-huh

Q. Is that a "yes?"

A. Yes.

Q. And that was on October 22nd of 2015; is that right?

A. Yes.

Q. And you didn't actually hire Mr. Fincher and file a claim with the Division until even after that date correct?

A. Right.

Q. And this -- all of this back pain ultimately started in 2014 when your back first started hurting you even though you weren't able to get treatment right?

A. Right.⁷

Claimant met with Travis S. Foxx, M.D., for examination on February 5, 2016, at respondent's request. Claimant reported pain radiating from her low back, down into her right buttock and into the right lower extremity. She described it as throbbing, with tightness, numbness, burning, aching, cramping, sharp, and tingling. The pain was constant and aggravated by activity. Claimant reported difficulty with some activities of daily living.

⁶ *Id.* at 26, 41-42; Resp. Ex. 1 at 12. Dr. Fardon's release is dated October 22, 2015.

⁷ *Id.* at 42-43.

Dr. Foxx wrote claimant presented with lumbar spine pain radiating into the right buttocks and distally to the knee, with the onset of pain beginning August 2015 while working on the slaughter line at Tyson. Dr. Foxx found claimant's past medical history of a back injury in 2012 and 2015 to be significant.

Dr. Foxx reviewed the provided medical records and opined claimant's medical condition is consistent with a work-related injury. He assessed lumbosacral radiculitis; displacement of lumbar intervertebral disc without myelopathy; and low back pain, but identified no specific date or mechanism of injury. Dr. Foxx did not recommend additional injections for claimant because they did not provide significant relief. He recommended claimant have a surgical evaluation and, because she had no support system in Kansas, he felt claimant should see a surgeon in Chicago, recommending Jeffery Wingate, M.D. Dr. Foxx returned claimant to work on February 8, 2016, with restrictions.

Claimant met with George G. Flutter, M.D., for an IME on May 24, 2016, at the request of her attorney. Dr. Flutter noted claimant's history of a blood clot in her leg and the treatment she received in Chicago. Dr. Flutter also noted claimant's history of low back pain. Claimant's complaints at this examination were, pain affecting the right lower back, buttock and leg. She described the pain as sharp, dull, aching, shooting and burning, severe and unbearable. She also reported numbness at the right side of her hip and going down her left side and weakness if she stands for more than 30-40 minutes. Everything claimant does leaves her in constant pain. Her pain has been treated with medications, injections and a back brace.

Dr. Flutter examined claimant and assessed the following: low back/right lower extremity pain/dysesthesia; lumbosacral strain/sprain; lumbar discopathy; probable lower extremity radiculitis; probable sacroiliac joint dysfunction; and probable trochanteric bursitis. He opined that there was a causal/contributory relationship between claimant's current condition and her repetitive work-related activities. He assigned restrictions and recommended medication; an EMG of selected muscles of the right leg and lumbar paraspinals; and the use of a soft abdominal/lumbar support brace during periods of activity; pool-based therapy; a TENS unit trial; interventional pain management procedures and possibly surgery.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2015 Supp. 44-508(e) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

The ALJ determined claimant's date of injury by repetitive trauma to be August 27, 2015, the date she was taken off work by Dr. Fardon. This Board Member finds difficulty with that assessment. There is confusion with the dates in this record. Claimant first identifies August 22, 2015, as the date she came back to work and reported her ongoing low back problems. Later, claimant identified on or about October 22, 2015, as the actual date she returned to work from her treatment in Chicago. Claimant testified Dr. Fardon questioned her about whether her employer had "workmen comp".⁸ But it is not clear whether this happened after the August 27, 2015, examination or the October 22, 2015, examination.

K.S.A. 2015 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

⁸ *Id.* at 14.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

This record suggests claimant first made respondent aware of a claim for a work-related series of trauma on or after October 22, 2015, when she returned with Dr. Fardon's return to work slip dated October 22, 2015. Claimant had only 20 days from her date of accident to provide respondent with notice of her alleged series of repetitive trauma. If claimant's date of accident is August 27, 2015, as the ALJ suggested, notice on or about October 22, 2015, does not satisfy the notice requirements of the statute. If her date of accident is determined to be on or after October 22, 2015, then the notice on or near October 22, 2015, would satisfy the statutory time requirements for notice.

The medical records of Dr. Fardon do not support a finding that he diagnosed a repetitive trauma associated with her job. He discusses her ongoing problems with standing and walking, and limits her ability to work due to her inability to stand, but does not specifically diagnose a work-related repetitive trauma.

Claimant testified that Dr. Fardon questioned whether her job had workers compensation benefits, which would lead one to believe a discussion occurred at that time regarding the work-related nature of her problems. That discussion appears to have occurred just prior to claimant returning to work in October 2015. Claimant testified that she reported her low back problems as being related to her job shortly after being released to work by Dr. Fardon. That correlates more with the October 22, 2015, date, than the August 27, 2015, date. This record does not support the finding by the ALJ that claimant suffered a statutorily identified date of accident on August 27, 2015.

This Board Member finds claimant's statutorily identified date of accident occurred on or about October 22, 2015, after claimant and Dr. Fardon discussed workers compensation benefits associated with claimant's job. The question regarding the workers compensation benefits indicates Dr. Fardon, at least tentatively, identified claimant's condition as work-related. This date more closely correlates with the requirements of K.S.A. 2015 Supp. 44-508(e) and, pursuant to K.S.A. 2015 Supp. 44-520, would cause

claimant's contact with the nurse shortly after her return to work to satisfy the notice requirements of the Act.

The determination that claimant's date of repetitive trauma was August 27, 2015, is reversed and the date of repetitive trauma is found to be on or about October 22, 2015. Therefore, claimant provided timely notice of her repetitive trauma. This matter is remanded to the ALJ for additional proceedings consistent with this Order.

Claimant also alleges respondent had actual knowledge of her repetitive trauma and its association with her job. The above findings render this issue moot.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed. Claimant suffered injury by repetitive trauma on or about October 22, 2015, and has satisfied her statutory burden of proving she provided timely notice of her alleged series of repetitive trauma while working for respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated September 13, 2016, is reversed and the matter remanded to the ALJ for additional proceedings consistent with this Order.

⁹ K.S.A. 2015 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
debbie@fincherlawoffice.com
roger@fincherlawoffice.com
tammy@fincherlawoffice.com

Randall W. Schroer, Attorney for Respondent and its Insurance Carrier
rschroer@mwklaw.com

Pamela J. Fuller, Administrative Law Judge